95-1741

Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MOODY H. DAVIS, PATRICIA DAVIS, and
THE BURK B. ROBERTS TRUST,
Petitioners,

v.

STUART D. SHANOR, TRUSTEE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a trustee conferred with authority under an 11 U.S.C. § 721 order is immune from the obligations imposed under 28 U.S.C. §§ 959, 960.

2. Whether the abandonment of real property from a bankruptcy estate pursuant to 11 U.S.C. § 554 expunges prior obligations imposed on a bankruptcy trustee by 28 U.S.C. §§ 959, 960.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below were:

Minnie M. Butler, Moody H. Davis, Patricia Davis, the Burk B. Roberts Trust and Stuart D. Shanor, Trustee of the Bellamah Community Development Estate. Mrs. Butler has passed away during the pendency of this action and is therefore not a party to this petition.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Moody H. Davis, Patricia Davis, and The Burk B. Roberts Trust (the "Davis Group"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Tenth Circuit is unreported (App., *infra*, at 1a-7a). The magistrate judge's proposed findings and recommended disposition is unreported (App., *infra*, at 8a-11a). The order of the United States District Court for the District of New Mexico, adopting the proposed findings of the magistrate judge and affirming the judgment of the bankruptcy court, is unreported (App., *infra*,

at 12a). The order of the United States Bankruptcy Court for the District of New Mexico is unreported (App., *infra*, at 13a-16a).

JURISDICTION

The court of appeals entered its order and judgment on November 28, 1995. On January 30, 1996, the court of appeals entered an order denying Petitioners' petition for rehearing (App., *infra*, at 17a-18a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 959 of title 28 of the United States Code, 28 U.S.C. § 959, provides in pertinent part:

. . . .

> (b) Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

Section 960 of title 28 of the United States Code, 28 U.S.C. § 960, provides:

> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

Section 721 of the Bankruptcy Code, 11 U.S.C. § 721, provides:

> The court may authorize the trustee to operate the business of the debtor for a limited period, if such

> operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.

Section 554 of the Bankruptcy Code, 11 U.S.C. § 554, provides in pertinent part:

> (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome of the estate or that is of inconsequential value and benefit to the estate . . . .

STATEMENT

This case involves the question of whether 28 U.S.C. §§ 959, 960 and Section 554 of the Bankruptcy Code, either collectively or singularly, exempt a Chapter 7 trustee from state and local taxes accruing post-petition on real property of the bankruptcy estate. The property in this case consists of a 334.11 acre planned unit development located in Lewisville, Denton County, Texas (the "LakePointe Property") (Appellant's 10th Circuit Appendix ("AA") 48). Petitioners sold the LakePointe Property to Bellamah Community Development ("Bellamah") in 1984 and as part of the consideration received a first lien promissory note and a first lien deed of trust on the LakePointe Property (the "Davis Group Lien") (AA 40).

Bellamah was in the real estate development business (AA 124). Such business included the acquisition of undeveloped and unimproved real property as well as the maintenance, development [in some cases], improvement and the sale of such property (AA 124-125).

Bellamah filed its voluntary petition for relief under Chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the District of New Mexico on June 1, 1989 (AA 48). Bellamah continued to operate its business as debtor-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108 until conversion of the case to a Chapter 7 proceeding on January 29, 1990. On or about February 2, 1990, Respondent was appointed in-

terim Chapter 7 trustee and became permanent trustee by operation of 11 U.S.C. § 702 on February 28, 1990 (AA 47). On February 14, 1990, Respondent filed his application for authorization to operate the Debtor's business pursuant to 11 U.S.C. § 721 (AA 55). Respondent was approved as a Section 721 operating trustee by order of the bankruptcy court entered on March 28, 1990 (AA 59). Respondent is hereafter referred to as the "Trustee".

At the time the Trustee was appointed as trustee of the Bellamah Estate, the liens against the LakePointe Property exceeded the value of the LakePointe Property (AA 49). The Trustee became aware of the absence of equity in the LakePointe Property early in his administration (AA 119-20). As of the commencement of the case, the LakePointe Property was encumbered by substantial unpaid ad valorem [i.e. real property] taxes. The principal amount of the ad valorem taxes owed pre-petition exceeded $422,000.00. Additionally, some $367,000.00 in ad valorem taxes accrued during the Chapter 11 proceeding. The Trustee had knowledge of the delinquent ad valorem taxes against the LakePointe Property at the time of his appointment as a Section 721 trustee (AA 143-44). During the tax years that the Trustee administered the LakePointe property, over $700,000.00 in additional ad valorem taxes, penalties and interest accrued against the LakePointe Property. The Trustee paid no portion of the ad valorem taxes that accrued on the LakePointe Property during the period of his administration of the LakePointe Property (AA 132).

The Trustee attempted to sell the LakePointe Property on several occasions notwithstanding that there was no equity in such property (AA 71). The sales contracts entertained by the Trustee would not have provided any proceeds to the unsecured creditors (AA 128-29). After such sale efforts proved fruitless, the Trustee then moved to abandon the LakePointe Property. On December 26, 1990, after nine months of attempting to sell the Lake-

Pointe Property, the Trustee filed and served his Motion for Leave to Abandon Property pursuant to which the Trustee sought leave to abandon a portion of the Lake-Pointe Property which was subject to the Davis Group Lien (the "First Abandonment") (AA 79). An Order approving the First Abandonment was entered on January 23, 1991 (AA 82). On November 27, 1991, the Trustee filed his Motion for Leave to Abandon Property (the "Second Abandonment") pursuant to which the Trustee sought to abandon the remaining portion of the LakePointe Property which was subject to the Davis Group Lien (AA 89). The court signed and entered its Order Granting Motion For Leave To Abandon Certain Portion Of LakePointe Property on April 22, 1992 (AA 91).

The Davis Group filed a lawsuit (the "Texas Case") in the United States District Court for the Eastern District of Texas, Sherman Division on April 20, 1992, Cause No. 4:92CV76, against Stuart D. Shanor (the "Trustee") in his *individual* capacity seeking the recovery of damages. The Texas Case alleges that the Trustee breached his fiduciary duties to the Davis Group in connection with the failure to pay ad valorem taxes accruing post-petition on the LakePointe Property and is liable in his *individual* capacity for such breach of duty. Prior to the date for filing an answer in the Texas Case, the Trustee filed an adversary proceeding (the "Adversary Proceeding") in the United States Bankruptcy Court for the District of New Mexico on May 1, 1992, seeking to enjoin the prosecution of the Texas Case by the Davis Group, and for declaratory relief.

On or about June 28, 1993, the Trustee filed his Motion for Partial Summary Judgment and Brief in Support of Motion for Partial Summary Judgment. On July 20, 1993, the Davis Group filed its Response to Motion for Partial Summary Judgment, Cross-Motion for Summary Judgment, Affidavit of Edward W. Roush, Jr., Memo-

randum in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Motion for Partial Summary Judgment, and Motion for Determination of the Adversary Proceeding as a Non-Core Proceeding. The Motion for Partial Summary Judgment was argued on July 26, 1993. On September 3, 1993, the bankruptcy court entered its Order on Cross Motions for Summary Judgment, On Trustee's Motion for Attorney's Fees and On Defendant's Motion for Determination of Adversary Proceeding as Non-Core granting the Trustee's requested declaratory relief (App., *infra*, at 13a-16a).

The district court, after briefing by the parties but without argument, affirmed the bankruptcy court's decision by adopting the proposed findings of the magistrate judge. The Davis Group appealed and the Tenth Circuit affirmed. In reaching its decision, the Tenth Circuit concluded that, notwithstanding that the Trustee was administering the estate with the powers conferred under an 11 U.S.C. § 721 order, the Trustee was not operating the debtor's business (App., *infra*, at 5a). While conceding that 28 U.S.C. §§ 959, 960 apply to an "operating trustee", the Tenth Circuit reasoned that "the simple fact the trustee obtained the court's authority to operate the business is not evidence he did so" (*Id.*, at 5a). Finally, the Tenth Circuit ignored the question of whether Section 960 applied to a trustee conducting liquidating activities, choosing instead to rely entirely on its interpretation of the operation of Section 554 of the Bankruptcy Code as dispositive of all arguments presented by Petitioners (App., *infra*, at 6a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRIOR CONSTRUCTION OF 28 U.S.C. § 960.

The Tenth Circuit's analysis that Section 960 of title 28 of the United States Code is not applicable to a bankruptcy trustee conducting liquidating activities [1] (App., *infra,* at 5a) is directly contrary to 92 years of Supreme Court precedent as articulated in *Swarts v. Hammer,* 194 U.S. 441 (1904), reaffirmed by *Boteler v. Ingels,* 308 U.S. 57 (1939), and, most recently confirmed in *California State Board of Equalization v. Sierra Summit, Inc.,* 490 U.S. 844 (1989).

The genesis of 28 U.S.C. § 960 is found in the Act of Congress of June 18, 1934, ch. 585, § 124a, 48 Stat. 993 (1934),[2] which later became 28 U.S.C. § 124a (1940 ed.). In 1948 this section was rewritten and subsequently codified as 28 U.S.C. § 960.[3] In doing so, Congress did not intend to change the substantive ap-

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[1] The Tenth Circuit concluded that the Trustee was not "operating" the business of the debtor and was merely acting as a "liquidating" trustee. Petitioners would assert that this conclusion was in error. *See* discussion, *infra,* at 14-17.

[2] The Act of Congress of June 18, 1934 read in pertinent part as follows:

> Any receiver, liquidator, trustee or other officers or agents appointed by any United States court who is authorized by *said* court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes to such business the same as if such business were conducted by an individual or corporation . . . .

[3] 28 U.S.C. § 960 (1952) (original version at ch. 646, § 960, 62 Stat. 927 (1948)). 28 U.S.C. § 960 reads as follows:

> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

plication of Section 124a through its revision into Section 960.[4] Even prior to the enactment of 48 Stat. 993, in *Swarts v. Hammer*, 194 U.S. 441 (1904), this Court recognized that property in the hands of a trustee was subject to state and local taxes. Subsequently in *Boteler v. Ingels*, 308 U.S. 57 (1939), this Court held that Section 124a applied to trustees conducting liquidating activities. Similarly, the federal district and circuit courts construing Section 124a uniformly held such statute applicable to trustees conducting either liquidating or operating activities. *See, e.g., Goggin v. Byram*, 172 F.2d 868 (9th Cir.), *cert. denied*, 388 U.S. 819 (1949); *Lyford v. State of New York*, 140 F.2d 840 (2d Cir.), *cert. denied*, 323 U.S. 714 (1944), *and cert. denied*, 327 U.S. 788 (1946); *State of Missouri v. Gleick*, 135 F.2d 134 (8th Cir. 1943); *In re Chicago & N.W. Ry. Co.*, 119 F.2d 971 (7th Cir. 1941); *In re Mid America Co.*, 31 F. Supp. 601 (S.D. Ill. 1939).

In subsequent cases construing the revised language of Section 960, the majority of the circuits followed the decisions under former Section 124a, holding that Section 960 is applicable to a trustee conducting liquidating activities. *See, e.g., In re I.J. Knight Realty Corp.*, 501 F.2d 62 (3rd Cir. 1974); *In re Hatfield Construction Co.*, 494 F.2d 1179 (5th Cir. 1974); *United States v. Kalishman*, 346 F.2d 514 (8th Cir. 1965), *cert. denied*, 384 U.S. 1003 (1966); *United States v. Sampsell*, 266 F.2d 631 (9th Cir. 1959); *Brown v. Collector of Taxes for the District of Columbia*, 247 F.2d 786 (D.C. Cir. 1957). In contrast, two circuits strayed from this path of consistent interpretation, holding that Section 960 is not applicable to a trustee conducting liquidating activities. *See In re Cusato Bros. Intern., Inc.*, 750 F.2d

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[4] *See Finley v. United States*, 490 U.S. 545, 554 (1989) (changes made in 1948 were part of the general revision of the Judicial Code and impart no significant change in meaning); Reviser's Note, 28 U.S.C. § 960 (1952); Moore, Judicial Code Commentary, § 0.03(44), at 297-98 (1949).

887 (11th Cir.) (Hill, J., dissenting)[5], *cert. denied*, 972 U.S. 1010 (1985); *California State Board of Equalization v. Goggin*, 245 F.2d 44 (9th Cir.), *cert. denied*, 353 U.S. 961 (1957).[6]

The divergent path chosen by the 11th and 9th Circuits were short lived, however, in the wake of this Court's clear directive in *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989). In holding that a liquidating trustee is subject to the tax payment obligations of Section 960, this Court stated: "[n]othing in the plain language of the statute, its legislative history, or the structure of the Bankruptcy Code indicates that Congress intended to exclude taxes on the liquidation process from those taxes the States may impose on the bankruptcy estate." *Id.* at 853.

Notwithstanding this overwhelming and dispositive history of judicial interpretation of Congressional intent,[7]

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[5] However, in the dissenting opinion, Justice Hill noted that Section 960 should be "interpreted for providing for the eventuality of liquidation by the trustee . . . ."

[6] The Ninth Circuit's interpretation of Section 960, as ultimately expressed in what is commonly known within the California Bar as "Goggin II" was expressly repudiated by this Court's ruling in *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989).

[7] The decision below is also contrary to the leading treatise on bankruptcy law. In *Collier on Bankruptcy*, the author notes that property in the hands on of a trustee in bankruptcy is subject to state property taxes. 3A *Collier on Bankruptcy*, ¶ 62.14, at 1517-18 (14th ed. 1975). Other legal scholars have analyzed this issue and consistently found an obligation of a bankruptcy trustee to pay state and local taxes. *See* Wurzell, *Taxation During Bankruptcy Liquidation*, 55 HARV. L. REV. 1141, 1175 (1942) (commenting on the affirmative duty of a trustee to seek out and pay taxes accruing during a liquidating proceeding); Glenn, *The Law Governing Liquidation*, § 561, at 810-12 (1935) (commenting that a liquidator has all the privileges of a taxpayer and also the disabilities including the taxes accruing after liquidation begins).

the Tenth Circuit has apparently chosen to go its own way and hold that Section 960 does not apply to a "liquidating" trustee, at least as to the payment of *ad valorem* taxes. The peril fostered by this opinion is far-reaching and significant. In a variety of state tax-based contexts, this Court has repeatedly considered, and rejected, the notion that a "liquidating" trustee is exempt from the tax liability imposed by Section 960. *See, e.g., Swarts v. Hammer, supra* (state, school and city taxes on estate property; non ad valorem based); *Boteler v. Ingels, supra* (state automobile license taxes); *Nicholas v. United States,* 384 U.S. 678 (1966) (state payroll taxes); *Otte v. United States,* 419 U.S. 43 (1974) (state and municipal wage claim withholding taxes); *California State Board of Equalization v. Sierra Summit, Inc., supra* (state sales and use taxes). However, in none of these cases has this Court squarely addressed the obligations imposed by Section 960 upon a liquidating trustee for the payment of *ad valorem* taxes. And therein lies the necessity for this Court's review. If the decision rendered below is left unchecked, the Tenth Circuit will have craftily forged an exception to an area thought to be safely ensconced within the purview of *California State Board of Equalization v. Sierra Summit, Inc.*—that a "liquidating" trustee is subject to *all* state tax obligations imposed under Section 960.

In light of this apparent assault on 92 years of consistent decisions, a review of the decision below is warranted.

II. THE DECISION BELOW IS NOT SUPPORTED BY THE PLAIN LANGUAGE OF SECTION 554 OF THE BANKRUPTCY CODE.

In reaching its decision, the Tenth Circuit invoked the purported authority of 11 U.S.C. § 554 reasoning that the "general rule of the effect of abandonment governs the resolution of this case" (App., *infra,* at 5a). Section 554 of the Bankruptcy Code, however, is silent as

to the effect of abandonment on other matters of federal law. The Tenth Circuit erred in construing the effects of abandonment on other federal law and in so doing read into a very simple statute, language and results that neither exist nor are compelled by the plain language of the Bankruptcy Code.

The power of abandonment, prior to the enactment of 11 U.S.C. § 554, derived its authority from a variety of sources including sections from the 1898 Bankruptcy Act,[8] former Bankruptcy Rules and case law.[9] Without question, Section 554(a) provides explicit authority for a bankruptcy trustee to abandon property that is burdensome to the estate.[10] However, the fact that estate property may be abandoned simply does not demonstrate that Congress intended to relieve a bankruptcy trustee from the obligations to pay state and local taxes accruing during the administration of an estate. *See Brown v. O'Keefe*, 300 U.S. 598, 602 (1937); *see also Black on Bankruptcy* § 70, at 264-65 (1898). Indeed, this Court has stated that property in a bankruptcy estate is subject to applicable state and local taxes absent a clear expression by Congress of an intent to create an exemption. *Swarts v. Hammer*, 194 U.S. at 444.

And while the power to abandon is now clearly expressed under Section 554, the scope of intended consequences flowing from such action has never been enunciated by Congress. Although nowhere set forth in statute or explained by Congressional comment, courts have rea-

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[8] However, the Bankruptcy Act of 1808 did not contain a specific provision for the abandonment of property. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *as amended by* the Chandler Act of June 22, 1938, ch. 575, 52 Stat. 840, 11 U.S.C. § 1 *et seq.*

[9] *See generally* Norton, *Bankr. L. & Prac.* § 39.01 (1984).

[10] Contrary to the procedural history set forth by the Tenth Circuit (App., *infra*, at 2a), the Davis Group did not by the instant action challenge the Trustee's authority to abandon the LakePointe Property.

soned that the effect of estate property abandoned is that it ceases to be part of the estate and title reverts to the debtor as if no bankruptcy petition had been filed. *See Brown v. O'Keefe*, 300 U.S. at 602; *In re Dewsnup*, 908 F.2d 588, 590-91 (10th Cir. 1990), *aff'd*, 502 U.S. 410 (1992). This title revesting mechanism has been often referred to as the "relation back" doctrine—i.e., the fictional relation back and revesting of title to property in the debtor to some point in the past as if events and consequences intervening had not taken place. Courts and commentators have consistently characterized any relation back and revesting effect of abandonment as a "legal fiction." [11]

However, it is a legal fiction which has been the object of much criticism by courts and commentators alike.

For example, in *United States v. Grant*, 971 F.2d 799 (1st Cir. 1992) (en banc), the First Circuit, in discussing the relation back doctrine, considered the relationship and interplay between the prior Bankruptcy Act and the Bankruptcy Code. Observing that such a doctrine may have had some utility under the prior Act, the First Circuit concluded that under the recodification of the Act, and particularly Section 541(a), the utility and necessity for such a device no longer existed.

Moreover, the invoking of a legal fiction to lend legitimacy to an abandonment under Section 554 is a perver-

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[11] *See Rosenblum v. Dingfelder*, 111 F.2d 406, 409 (2nd Cir. 1940) ("Relation back may be considered in the nature of a fiction"); *Wallace v. Lawrence Warehouse Co.*, 338 F.2d 392, 394 n.1 (9th Cir. 1964) ("[Relation back] is a fiction, and a fiction is but a convenient device, invented by the courts to aid them in achieving a just result. It is not a categorical imperative, to be blindly followed to a result that is unjust"); *United States v. Grant*, 971 F.2d 799 (1st Cir. 1992) (en banc) (discussing the origins of the legal fiction under a very dissimilar framework of the Bankruptcy Act); Williams, *Tax Consequences of Abandonment under the Bankruptcy Code*, 67 TEMPLE L. REV. 13 (1994) (discussing the confusion in results of abandonment on tax matters and the need for a comprehensive model).

sion of legislative intent. The legislative history establishes that the only intended basis for invoking this doctrine was to resolve disputes involving title and possessory rights. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6333; S. Rep. No. 989, 95th Cong., 1st Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5878.

Finally, the legal fiction of "relation back" lies in the realm of theoretics. It is, in practice and application, a judicial construct—a contrivance of convenience which has been seized upon by some courts to produce a preordained result. And it is this aspect of susceptibility to judicial leger-demain that compromises its capacity and authority to reform. For example, in its order, the Tenth Circuit observed that "abandonment of property by the trustee under 11 U.S.C. § 544 [sic]" excludes it from administration by the estate and that "abandonment of estate property nullifies its previous relationship to the bankruptcy estate" (App., *infra*, at 5a-6a). The results that necessarily flow from this logic underscore the dubious vitality of this doctrine. Prior to abandonment, the Trustee spent months seeking court approval (and incurred substantial legal expenses) for employing real estate professionals to sell the LakePointe Property and for the approval of contracts for the sale of such property. If, in fact, upon abandonment such nullification occurs, then all such actions and estate resources were squandered on property that could not have been conveyed—because such property, at least according to the Tenth Circuit, was never part of the estate. As the First Circuit, sitting en banc, aptly noted, the judicial application of abandonment can no more relate back and reform reality than it can restore estate property destroyed by fire. *See Grant*, 971 F.2d at 806.

In essence, the Tenth Circuit based its ruling on a dubious and justifiably maligned "legal fiction" rather than on the express federal enunciated in 28 U.S.C. § 960, a statutory provision which has remained intact since 1952

(*see* discussion, *supra*, at 7-9). As the Bankruptcy Code contains no provision which allows for the automatic, retroactive revesting of title in the debtor at the time of abandonment, the confusion produced by the application of this doctrine is inescapable and warrants review by this Court.[12]

III. THE DECISION BELOW REQUIRES AN ANALYSIS CONTRARY TO THE PLAIN LANGUAGE OF SECTION 721 OF THE BANKRUPTCY CODE.

The Tenth Circuit held that the Trustee was not operating the debtor's business. The basis for the court's conclusion was that there was no evidence that the Trustee stepped into the shoes of the debtor and began operating the business of the debtor (App., *infra*, at 5a).

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[12] The Tenth Circuit's suggestion, in *dicta*, that the result reached below might be the same even if abandonment had not occurred (App. *infra*, at 6a-7a) is equally difficult to reconcile. Any reliance by the court below on Section 502(b)(3) or Section 503(a) of the Bankruptcy Code as a clear expression of Congressional intent to preclude the payment of post-petition taxes incurred by a bankruptcy estate is misguided and confuses the concept of pre-petition claim and post-petition administrative expense. First, a reading of the authorities and commentaries on the application of Section 64a(4) [the predecessor to Section 502(b)(3)] demonstrates that such section(s) are not applicable to taxes incurred post-petition as administrative expense but solely limits the payment of pre-petition tax claims to the value of the interest of the estate in the property. *See In re Spruill*, 78 B.R. 766 (Bankr. E.D.N.C. 1987); *In re Pioneer Title Building, Ltd.*, 133 B.R. 822 (Bankr. W.D. Tex. 1991); *In re Wendy's Food Systems, Inc.*, 117 B.R. 333 (Bankr. S.D. Ohio 1990). *See also* 3A *Collier on Bankruptcy* ¶ 64.407 at 2230-31 (14th ed. 1975) (Section 64a(4) of the Bankruptcy Act was not applicable to taxes incurred post-petition) (citations omitted); *Nadler, The Law of Bankruptcy*, § 200, at 198 (1948) (noting the distinction between taxes accruing before and after the filing of a bankruptcy petition and that taxes accruing post-petition are not subject to the limiting proviso of subsection (4) of Section 64a of the Bankruptcy Act) (citations omitted) 6 *Remington, A Treatise on the Bankruptcy Law of the United States* § 2842, at 443-45 (1952) (same). Second, the obligation to pay taxes accruing during the administration of the estate under Section 960 is not limited by 11 U.S.C. § 503(a).

The court of appeals reasoned that, notwithstanding the Trustee seeking, obtaining and amending a Section 721 order to operate the debtor's business, the Trustee's activities did not constitute operating the debtor's business. *Id.*

Gamering the right to carry on the operation of a debtor's business in a Chapter 7 proceeding is the exception and not the rule. *Compare* 11 U.S.C. § 721 *with* 11 U.S.C. § 1108. A trustee cloaked with authority under Section 721 creates a special status of trustee; a trustee does not need Section 721 status to merely liquidate property of the estate. 11 U.S.C. § 704(1); 11 U.S.C. § 363. The court below characterized the Trustee's actions as to the LakePointe Property as attempts to liquidate it for the benefit of the estate. However, by virtue of the fact that the debtor was a land development company, the act of selling property was an act of carrying on its business.[13] Moreover, the Trustee consistently represented that he was operating the debtor's business. In the addendum to the monthly reports filed by the Trustee during the relevant period, the Trustee repeatedly represented that he "has continued to operate BCD [Bellamah Community Development] in accordance with the 721 Order entered by the Court" (AA 97-115). The Trustee also filed documents entitled "Operating Report" wherein the Trustee summarized unpaid tax liability (AA 106). These operating reports also contained profit/loss statements which determined, among other things, gross profit, accumulated depreciation, and partner's equity (AA 113-14). In addition to selling and attempting to sell improved land parcels, the Trustee directed some of the estate property to be mowed and repaired (AA 158) and moved the Court to employ an engineer to perform engineering work on certain real property of the debtor in Dallas County, Texas (AA 103).

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[13] In fact, the ultimate goal of the business operation of Bellamah was, like most real estate development companies, the sale of property. *See* (AA 124).

That the actions taken by a trustee while acting under the Section 721 order might, on first glance, appear as acts of liquidation is not surprising. Any operation of the debtor's business under Section 721, by definition, must "be consistent with the orderly liquidation of the estate." 11 U.S.C. § 721. In circumstances such as this, distinguishing between liquidation and operation for each activity undertaken by a trustee is well beyond a creditor's abilities. Such a standard would require a party in interest to be aware of, analyze, and quite probably, seek judicial determination of whether each particular activity of a trustee is an act of liquidation or an act of operation. Such a standard would result in an action specific or property specific analysis that would grate against the plain meaning of the statute. Section 721 status authorizes a trustee to operate the business of the debtor. The language does not authorize a trustee to operate a *portion* of the business or only *specific property* of the debtor.[14] The language of Section 721 is plain and clear.

There is a paucity of judicial decisions construing Section 721 and its predecessor [Section 2a(5) of the Bankruptcy Act]. But, if the (1) seeking and obtaining a Section 721 order to operate the debtor's business, (2) the employment of professional persons to assist with carrying on the debtor's business, (3) the existence of actions by a trustee consistent with operating the business of the debtor and (4) representations by a trustee that

---

[14] The district court employed a property specific analysis to determine whether the Trustee was operating the business of the debtor. *See* App., *infra*, at 10a ("the bankruptcy court correctly ruled that no evidence was adduced to show that the Trustee was carrying on the business of this property" and that "although the Trustee was authorized to operate the debtor's business under 11 U.S.C. § 721, his only action with respect to this property were attempts to sell followed by abandonment.") (emphasis added). It is unclear from the wording of its order whether the Tenth Circuit adopted this property specific analysis of operating the debtor's business.

he is operating the business of the debtor are, in fact, insufficient to constitute operating the business of the debtor (or in this case an issue of fact), then the issue is ripe for this Court to announce a definitive standard by which the actions of a Section 721 trustee are to be measured.

IV. THE PROPER INTERPRETATION OF A BANKRUPTCY TRUSTEE'S STATUTORY OBLIGATIONS REGARDING TAX LIABILITY IS AN IMPORTANT AND RECURRENT ISSUE.

This case presents several important, and inevitably recurrent, issues concerning the proper interpretation of a bankruptcy trustee's obligations under federal law. Most notable is the recurrent questioning of a bankruptcy trustee's liability for taxes during administration of the estate. The decision below undertakes to carve out an exemption from taxation where none exists. And despite nearly a century of litigation arising under uniform federal bankruptcy laws, the specific issue presented in this case—whether abandonment of estate property (now codified at 11 U.S.C. § 554) retroactively extinguishes the statutory obligation of a trustee to seek out and pay taxes incurred by the estate during administration (now codified as 28 U.S.C. § 960)—has never been squarely addressed. Without a clear directive from this Court as to the proper relationship between abandonment and a trustee's duty to pay taxes on property in a bankruptcy estate during administration, an uniform application of the Bankrutcy Code will not likely occur.

A definitive resolution of the issues in this case is vital to provide a consistent result. While not every bankruptcy estate contains real property, disputes over a trustee's obligation to pay real property taxes during the course of an estate administration are recurrent in nature. The affirmation of a trustee's liability for real property taxes should come from this Court and not be determined on an *ad hoc* basis by the lower courts.

Only this Court can provide the long-needed direction to the federal courts regarding these issues.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[Filed Nov. 28, 1995]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-2198
(D.C. No. CIV-93-1129-M)
(D. New Mexico)

MINNIE BUTLER, MOODY H. DAVIS, PATRICIA DAVIS, and THE BURK B. ROBERTS TRUST,
Plaintiffs-Appellants,

v.

STUART D. SHANOR, Trustee,
Defendant-Appellee.

ORDER AND JUDGMENT *

Before MOORE and LOGAN, Circuit Judges, and O'CONNOR, District Judge.**

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* This order and jujdgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

** The Honorable Earl E. O'Connor, Senior District Judge for the United States District Court for the District of Kansas, sitting by designation.

This appeal arises from an ongoing dispute between Stuart D. Shanor, Chapter 7 Trustee of the bankruptcy estate of Bellamah Community Development, and Minnie Butler, Moody H. Davis, Patricia Davis, and the Burk B. Roberts Trust (The Davis Group). The Davis Group held the first consensual lien on property which was part of the bankruptcy estate. Over the Davis Group's objection, Mr. Shanor, as trustee, abandoned the property with the bankruptcy court's approval. The Davis Group challenged the trustee's ability to abandon the property and his responsibility for paying the ad valorem taxes which had accrued against the property during the pendency of the bankruptcy proceedings. The Davis Group contends the bankruptcy and district courts erred in denying their challenge. We disagree and affirm.

The instant case began when Mr. Shanor filed an adversary action in the United States Bankruptcy Court for the District of New Mexico seeking a declaratory judgment that his failure to pay the ad valorem taxes on the abandoned property was appropriate. After concluding it had jurisdiction over the dispute as a core proceeding, 29 U.S.C. § 157(b)(2), the bankruptcy court granted the declaratory judgment by summary judgment. The Davis Group appealed this decision to the district court.

Rather than conducting its own review, the district court referred the appeal to a magistrate judge. The magistrate judge recommended the bankruptcy court be affirmed. The district court adopted the magistrate's proposed findings of fact and recommendation as its final order. The Davis Group now appeals that decision.

The underlying facts are well known to the parties, and they need not be reiterated for the purpose of this disposition. We are called upon to determine whether the bankruptcy court properly exercised its jurisdiction and whether the ad valorem taxes on the Davis Group property became an expense of administration which the trustee was obli-

gated to pay. We conclude there was jurisdiction and that the ad valorem taxes never became a burden of the estate.

We review a grant of summary judgment de novo, applying Fed. R. Civ. P. 56 identically as the district court. *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 796 (10th Cir. 1993). On appeal, all the evidence is considered in the light most favorable to the non-moving party. *Applied Genetics Int'l v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). Summary judgment is appropriate only if there is no genuine issue of material fact for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986).

The bankruptcy code provides, in relevant part:

> 28 U.S.C. § 157. Procedures
>
> . . . .
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
>
> (2) Core proceedings include, but are not limited to—(A) matters concerning the administration of the estate;
>
> . . . .
>
> and
>
> (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

"Core proceedings are proceedings which have no existence outside of bankruptcy. Actions which do not de-

pend on the bankruptcy laws for their existence and which could proceed in another court are not core proceedings." *In re Gardner,* 913 F.2d 1515, 1518 (10th Cir. 1990) (per curiam) (citations omitted). In this case, the trustee sought a declaratory judgment to clarify his responsibility for paying ad valorem taxes on property that passed through the estate. Because the Davis Group asserted the payment of the ad valorem taxes were a burden upon the estate and payable as an administrative claim, it is unassailable that the issues raised were "matters concerning the administration of the estate," and matters "affecting the liquidation of the assets of the estate." 28 U.S.C. §§ 157(2)(A) and (O). Thus, the bankruptcy court had jurisdiction to issue a final order and judgment in this case pursuant to section 157(b)(1).

The Davis Group also argues that the bankruptcy court should have exercised its discretion not to grant declaratory relief because of the pendency of other litigation between the parties in another forum. Whether the declaratory action should be entertained is a matter committed to the exercise of the sound discretion of the trial court. *Kunkel v. Continental Cas. Co.,* 866 F.2d 1269, 1273 (10th Cir. 1989) (citing *Alabama State Fed'n of Labor v. McAdory,* 325 U.S. 450, 462 (1945)). There was no abuse here because the trustee's duties are defined by the Bankruptcy Code, the interpretation of which is within the jurisdiction of the bankruptcy court. Therefore, we believe the existence of another lawsuit outside the bankruptcy forum is not a reason for the bankruptcy court to defer the exercise of its lawful authority.

The Davis Group next argues the trustee had the obligation to pay the ad valorem taxes which accrued on the property prior to abandonment. They predicate their argument upon the belief the trustee was operating the debtor's business; consequently, he became responsible for the ad valorem taxes that accrued during that operation. 28 U.S.C. §§ 959 and 960.

While we agree an operating trustee is subject to those provisions, *In re Kaiser Steel Corp.*, 87 B.R. 662, 665 (Bankr. D. Colo. 1988), nothing in the record suggests they are applicable here. Although the Davis Group argues the issue of whether the trustee was operating the debtor's business is contested, there is no apparent disagreement over the underlying facts.

It is undisputed the trustee attempted to sell the property in which the Davis Group held an interest as he did all the property which came into the estate. The Davis Group contends that because the debtor was in the business of selling property, the trustee must have been operating that business. Their contention belies a fundamental misunderstanding of the role of a trustee in bankruptcy.

Among the principal duties of a liquidating trustee is the obligation to marshal the assets of the estate and dispose of them in a manner that will best protect the interests of the entire estate. 11 U.S.C. § 544. That is what the trustee did in this case. Although he ultimately abandoned the Davis Group property, he initially attempted to liquidate it for the benefit of the estate. That effort does not constitute the operation of the debtor's business.

Moreover, the simple fact the trustee obtained the court's authority to operate the business is not evidence he did so. Nothing is suggested by the Davis Group indicating the trustee stepped in the debtor's shoes and operated the business the debtor conducted prior to bankruptcy.

More fundamentally, the abandonment of the property by the trustee under 11 U.S.C. § 544 excludes it from the burden of administration as part of the assets of the estate. We have said:

> Property abandoned under this section ceases to be part of the estate. It reverts to the debtor and stands as if no bankruptcy petition had been filed. Follow-

> ing abandonment, "whoever had the possessory right to the property at the filing of bankruptcy again reaquires that right." Abandoned property is *not* property administered by the estate.

In Re Dewsnup, 908 F.2d 588, 590 (10th Cir. 1990) (per curiam) (citations omitted and emphasis in original), *aff'd* 502 U.S. 410 (1992). Other courts have followed this general rule that abandonment of estate property nullifies its previous relationship to the bankruptcy estate. *See In re Argiannis,* 156 B.R. 683, 688 (Bankr. M.D. Fla. 1993); *In re J.A.V. AG., Inc.,* 154 B.R. 923, 926 and n.5 (Bankr. W.D. Tex. 1993); *In re Wilson,* 94 B.R. 886, 888 (Bankr. E.D. VA 1989); *In re McGowan,* 95 B.R. 104, 106 (Bankr. N.D. Iowa 1988); *In re Painter,* 84 B.R. 59, 62 (Bankr. W.D. VA 1988).

On its face, this general rule of the effect of abandonment governs the resolution of this case. It is simply unarguable that because the estate no longer possessed any interest in the property it had no responsibility to pay the ad valorem taxes. Yet, even if abandonment had not occurred, the results might still be the same.

As the trustee explains, in bankruptcy proceedings the payment of ad valorem taxes is subject to two basic approaches. If the trustee liquidates the property, the accumulated taxes could be paid as an administrative expense. 11 U.S.C. §§ 503(b)(1)(B) and 507(a)(7)(B). However, because ad valorem taxes are a burden upon, and follow the property, the second approach would be to reduce the liquidating price of the property to reflect the amount of the tax lien and convey the property subject to the taxes. In such a transaction, the purchaser becomes liable for the ad valorem taxes.

The Davis Group ignores these distinctions and insists there is no alternative but for the trustee to pay the ad valorem taxes that accumulated while the property was part of the bankruptcy estate. Of course, this is

tantamount to shifting the burden of the tax to the unsecured creditors of the estate to free the Davis Group from the lien that follows the property.

It is fundamental the trustee had no authority to pay the ad valorem taxes in this case because there was no request for payment by the taxing authorities. 11 U.S.C. § 503(a). Under this section, it is the taxing authority, not the creditors, that determines the potential liability of the bankruptcy estate for the payment of ad valorem taxes. Thus, although assessed against property administered by the estate, the ad valorem taxes never became an expense of administration in this estate because no such request was ever made.

Additionally, the Davis Group contention also ignores 11 U.S.C. § 502(b)(3). Because the amount of the liens on the Davis Group property exceeded its value, this section would have barred the payment of these ad valorem taxes as a claim against the estate.

It is further noteworthy the Davis Group could have protected itself from the accumulation of tax liens during the early stages of the bankruptcy proceeding by seeking abandonment, or by requesting the bankruptcy court to grant it relief from stay so it could enforce its own lien. It did neither. Instead, it followed the unusual step of seeking to intervene in an attempt by the holder of the second consensual lien to obtain relief from stay. After rejection of this effort, the Davis Group abandoned its appeal from the denial. We therefore conclude the Davis Group has demonstrated no equitable reason why the unsecured creditors should bear the burden of taxes upon the abandoned property ultimately coming into the hands of the Davis Group.

AFFIRMED.

Entered for the Court

JOHN PORFILIO MOORE
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ. No. 93-1129 M/WWD

MINNIE BUTLER, MOODY H. DAVIS, PATRICIA DAVIS, and THE BURK B. ROBERTS TRUST,
Appellants,

vs.

STUART D. SHANOR, TRUSTEE,
Appellee.

MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

Proposed Findings

1. This matter comes before the Court on appeal from the United States Bankruptcy Court. 28 U.S.C. § 158(a). Appellants Minnie Butler, Moody H. Davis, Patricia Davis, and The Burk B. Roberts Trust ("Davis"), Defendants below, appeal from an order entered September 3, 1993, granting a motion for partial summary judgment of Appellee Stuart D. Shanor, Chapter 7 Trustee ("Trustee"), Plaintiff below, on Count II of the Complaint. Count I of the Complaint having been previously resolved, the referenced order is final and this Court has jurisdiction to consider the appeal.

2. Davis asserts seven errors by the bankruptcy court which can be distilled to two issues:

(a) Whether the bankruptcy court ruled correctly that Count II of the complaint is a core proceeding, 28 U.S.C. § 157(b)(2), and

(b) Whether the bankruptcy court ruled correctly that the Trustee's failure to pay certain real property taxes was proper.

Trustee states the issue as whether his abandonment of the property precluded any property tax obligation on the Trustee.

3. We review this matter *de novo. In re Mullet,* 817 F.2d 677 (10th Cir. 1987). No genuine issues of fact were presented in opposition to the Trustee's motion.

4. The facts are as follows. Davis sold certain real property to Bellamah Community Development, taking back a first lien. Bellamah later filed under the bankruptcy code, and, upon conversion to Chapter 7, the Trustee was appointed. Liens against the property exceeded its value, and between the time of filing and conversion to Chapter 7 *ad valorem* taxes accrued in the amount of $367,000. After attempting to sell the property, the Trustee abandoned the property under 11 U.S.C. § 554. No property taxes were paid by the Trustee.

5. The bankruptcy court correctly ruled that Count II of the complaint is a core proceeding. Core proceedings are those matters in which the bankruptcy court may enter final orders and judgments, such as administration of the estate and adjustment of the debtor-creditor relationship, 28 U.S.C. § 157, and which would have no existence except for the bankruptcy. *Gardner v. United States (In re Gardner),* 913 F.2d 1515, 1518 (10th Cir. 1990). Davis argues that this case presents an exception to the conceded rule that the Trustee may not be sued outside the bankruptcy court without leave of that court. The exception, found in 28 U.S.C. § 959, allows actions against trustees resulting from conduct of estate

busines. Here, although the Trustee was authorized to operate the debtor's business under 11 U.S.C. § 721, his only actions with respect to this property were attempts to sell followed by abandonment. Davis' argument is based on liquidation issues or actual carrying on of the debtor's business, and ignores the fact of abandonment. *See Allard v. Weitzman (In re DeLorean Motor Co.),* 991 F.2d 1236 (6th Cir. 1993); *U. and I., Inc. v. Fitzgerald (Matter of Campbell),* 13 B.R. 974 (Bankr. D. Idaho 1981). Count II of the complaint does not constitute an exception to the rules regarding actions against trustees and is, therefore, a core proceeding.

6. The bankruptcy court correctly granted summary judgment as to the Trustee's duty to pay *ad valorem* property taxes. Davis argues that (a) a fact issue exists whether the Trustee was actually carrying on the business of the subject property, and (b) because the Trustee was operating this property, he was liable for the *ad valorem* taxes. The proffered evidence consists of obligatory operating reports, 11 U.S.C. § 704(8), and shows nothing more than that the Trustee was attempting to sell the property prior to abandonment. *See Matter of Campbell,* 13 B.R. at 976, supra. The bankruptcy court correctly ruled that no evidence was adduced to show that the Trustee was carrying on the business of this property.

7. Even assuming *arguendo* that the Trustee operated the property in the interim, he had neither the duty nor the authority to pay the *ad valorem* taxes. When the property was abandoned, the legal effect was that it had never been in the estate and thus no taxes were owed. *Dewsnup v. Timm (In re Dewsnup),* 908 F.2d 588, 590 (10th Cir. 1990); aff'd 502 U.S. ——, 112 S.Ct. 773 (1992); *Terjen v. Santaro (In re Terjen),* 154 B.R. 456 (E.D. Va. 1993); *In re Skinner Lumber Co.,* 35 B.R. 31 (Bankr. D.S.C. 1983).

8. The Davis brief discusses at some length certain rules with respect to declaratory judgment actions. The

brief does not assert, nor offer evidence of, abuse of discretion by the bankruptcy court in hearing this proceeding. *Kunkel v. Continental Casualty Co.*, 866 F.2d 1269 (10th Cir. 1989).

9. The Davis brief requests oral argument. On the basis of the full record and comprehensive briefs, and in particular because Davis chose not to submit a reply brief, this request should be denied as unnecessary.

10. Within ten days after a party is served with a copy of these proposed findings and recommendations that party may, pursuant to 28 U.S.C. § 636(b)(1), file written objections to such proposed findings and recommendations.

Recommended Disposition

I recommend that the request for oral argument be denied and the order of the Bankruptcy Court be affirmed.

/s/ William W. Deaton
WILLIAM W. DEATON
United States Magistrate Judge

APPENDIX C

[Filed Aug. 31, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ. No. 93-1129 M/WWD

MINNIE BUTLER, MOODY H. DAVIS, PATRICIA DAVIS and THE BURK B. ROBERTS TRUST,
Appellants,

vs.

STUART D. SHANOR, TRUSTEE,
Appellee.

ORDER

THIS MATTER having come before the Court on the proposed findings and recommendation of the magistrate judge; objections having been made to the proposed findings and recommendation; and the Court, after a de novo determination, having found that the objections are not well taken, and that the proposed findings and recommendation of the magistrate judge should be adopted by the Court;

IT IS ORDERED THAT the Order of the Bankruptcy Court from which this appeal was taken be, and it is hereby, AFFIRMED.

/s/ [Illegible]
United States District Judge

APPENDIX D

[Filed Sep. 5, 1993]

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

IN RE BELLAMAH COMMUNITY DEVELOPMENT,
a New Mexico general partnership,
Employer ID No. 85-0296658,
Debtor.

No. 7-89-01559 M A

Adversary 92-1112 M

STUART D. SHANOR, Trustee,
Plaintiff,

v.

MINNIE BUTLER, MOODY H. DAVIS, PATRICIA DAVIS
and THE BURK B. ROBERTS TRUST,
Defendants.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT, ON TRUSTEE'S MOTION FOR ATTORNEY'S FEES AND ON DEFENDANTS' MOTION FOR DETERMINATION OF ADVERSARY PROCEEDING AS NON-CORE

This matter came before this Court on the following motions: (1) Plaintiff's Motion for Partial Summary Judgment, (2) Defendants' Cross-Motion for Partial Sum-

mary Judgment, (3) Defendants' Motion for Determination of Adversary Proceeding as Non-Core, and (4) Plaintiff's Motion for Award of Attorney's Fees. Having considered the facts, the memoranda of law, the applicable law, the argument of counsel and otherwise being fully informed and advised, the Court finds that the Plaintiff's Motion for Partial Summary Judgment is well taken and will be granted as to Count II of the complaint, which the Court finds is a core proceeding. Plaintiff's Motion for Award of Attorney's Fees will be denied. Having determined that Count I of the complaint is a non-core, related to proceeding, the Court will make proposed findings of fact and conclusions of law in a separate document.

MOTION FOR SUMMARY JUDGMENT ON COUNT II

Count II of the Plaintiff's complaint seeks a declaration that the Trustee's failure to pay the real property taxes on certain real property on the estate known as the LakePointe property was appropriate. This Court holds that Count II is a core proceeding under 28 U.S.C. § 157(b)(2). Defendants have provided no facts or legal authority to show that the Trustee was authorized or required to pay pre- or post-petition real property taxes on the Lakepointe property, which was eventually abandoned. Based on the undisputed facts, the Court will grant the Plaintiff summary judgment on Count I of his complaint and hold that his nonpayment of taxes was appropriate.

TRUSTEE'S MOTION FOR ATTORNEY'S FEES

In Count I of the complaint, and in his Supplemental Brief in Support of Motion for Partial Summary Judgment: Award of Attorney's Fees, Plaintiff asks this Court to award him the attorney's fees, costs and expenses incurred by the bankruptcy estate in defending the action in the United States District Court for the Eastern Dis-

trict of Texas and in prosecuting this adversary proceeding. As for this motion, even though such fees are requested as part of Count I, the non-core, related to, count of Plaintiff's complaint, the Court holds that the Plaintiff's request for attorney's fees pursuant to Section 105 or 362 of the Bankruptcy Code is clearly a core matter in which this Court can issue a final order.

Plaintiff asserts two grounds for the award of attorney's fees: (1) the Defendants' willful violation of the automatic stay under 11 U.S.C. § 362(h) in bringing the Texas lawsuit against Plaintiff, and (2) the Defendants' lack of a good faith basis in bringing the Texas action under 28 U.S.C. § 959(a).[1]

As for the Court's power under § 362(h) to award damages and attorney's fees for a willful violation of the stay, the Court finds that Plaintiff has made an insufficient showing of Defendants' willful violation of the stay. Although this Court has the power to sanction parties for civil contempt under § 105(a), *see, In Re: Skinner,* 917 F.2d 444 (10th Cir. 1990), Plaintiff has not properly brought this as a civil contempt proceeding, and on the facts presented, the Court could not find that Defendants committed civil contempt of this Court. As to whether the Defendants should be liable to the Plaintiff for attorney fees under Federal Rule of Civil Procedure 11, this Court holds that that question is only properly addressed in the Texas proceeding.

IT IS ORDERED that the Plaintiff's Motion for Summary Judgment is granted as to Count II, the Defendants'

---

[1] Section 959(a) provides in pertinent part:

> Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

Cross Motion for Summary Judgment is denied, Defendants' Motion for Determination of Plaintiff's Motion for Award of Attorney's Fees is denied.

/s/ Mark B. McFeeley
MARK B. MCFEELEY
United States Bankruptcy Court

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 94-2198

MINNIE BUTLER, MOODY H. DAVIS, PATRICIA DAVIS, THE BURK B. ROBERTS TRUST,
Plaintiffs-Appellants,
v.

STUART D. SHANOR, Trustee,
Defendant-Appellee.

ORDER

Entered January 30, 1996

Before PORFILIO and LOGAN, Circuit Judges, and O'CONNOR *, District Judge.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

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* Honorable Earl E. O'Connor, Senior District Judge for the United States District Court for the District of Kansas, sitting by designation.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER
Clerk

By /s/ Audrey F. Weigel
Deputy Clerk

Supreme Court, U.S.
FILED
MAY 24 1996
CLERK

(2)

No. 95-1741

In The

Supreme Court of the United States

October Term, 1995

MOODY H. DAVIS, PATRICIA DAVIS, and THE BURK B. ROBERTS TRUST,

Petitioners,

v.

STUART D. SHANOR, TRUSTEE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Stuart D. Shanor, Chapter 7 Trustee in Bankruptcy of Bellamah Community Development, ("Respondent") submits this brief to oppose the Petition for a Writ of Certiorari ("Petition") filed by Moody H. Davis, Patricia Davis and the Burk B. Roberts Trust ("Petitioners"). Respondent agrees with the "Opinions Below" and "Jurisdiction" portions of the Petition. Petition at 1-2.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Respondent believes that portions of two statutory provisions, in addition to those set forth in the Petition, are pertinent to this Court's consideration of the Petition. Section 502 of Title 11 of the United States Code provides in part:

> (b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that –
>
> . . . .
>
> (3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

Section 503 of Title 11 of the United States Code provides in part:

> (a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.
>
> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –
>
> (1) . . .
>
> (B) any tax –
>
> (i) incurred by the estate, except a tax of a kind specified in section 507 (a)(8) of this title; . . .

RESPONDENT'S SUPPLEMENTAL STATEMENT

While Petitioners' "Statement" is basically accurate, there are several facts which Respondent believes should be considered by this Court in determining the disposition of the Petition. This case was originally brought by the Respondent seeking a declaration that he had acted appropriately by not using assets of the bankruptcy estate which would otherwise be available to pay unsecured creditors' claims, to pay *ad valorem* taxes on real property which he had abandoned pursuant to orders of the bankruptcy court.

Contrary to the position of the Petitioners, the question which determines the issue in this case and which

was properly decided by the Tenth Circuit Court of Appeals is: "What effect does the abandonment of real property have on a bankruptcy trustee's duty to pay outstanding ad valorem taxes assessed against that real property?" Respondent respectfully urges that his abandonment of the subject LakePointe Property renders the application of 28 U.S.C. §§ 959, 960 ("Sections 959 and 960") irrelevant in this case.

Bellamah Community Development ("Bellamah"), the debtor in this case, was a New Mexico general partnership which had substantial real estate holdings in New Mexico, Oklahoma, Texas, Colorado, and Arizona. One of the assets of Bellamah was the LakePointe Property located in Texas. Bellamah acquired the LakePointe Property from Respondents and one other party[1] and paid part of the consideration for that acquisition with a promissory note secured by a Deed of Trust. The Deed of Trust provided, among other things, that in the event Bellamah failed to pay the taxes due against the LakePointe Property, that Petitioners had the option of so doing, and could accelerate all amounts due under the terms of the Note and foreclose the Deed of Trust, or could add the amounts paid to the Note, which would then be secured by the Deed of Trust. After Bellamah's acquisition of the LakePointe Property, it granted subordinate Mortgages or Deeds of Trust against the real property to secure repayment of loans made to Bellamah by

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[1] Minnie Butler, who apparently died during the pendency of this appeal, was the other party from whom Bellamah acquired the LakePointe Property. Petition at ii.

two other entities. Those debts were also unpaid at the time of bankruptcy.

Respondent was appointed to act as Chapter 7 Trustee for Bellamah in February 1990 after the case had been converted to Chapter 7. Shortly after his appointment, Respondent sought authorization, pursuant to the provisions of 11 U.S.C. § 721, to operate Bellamah's business for a limited period of time and for a limited purpose – that is to allow him to sell some of the hundreds of residential lots which Bellamah owned for a designated minimum sales price, without the necessity of further Court order, and to allow him to continue the employment of several key employees for a limited period of time. An Order so providing was entered by the United States Bankruptcy Court for the District of New Mexico on March 20, 1990 ("the 721 Order"). Notwithstanding the inferences made by Petitioner, the 721 Order was not a general operating order, but was specifically limited in scope, restricting the Trustee to "limited" operations of the Debtor's business. The unrebutted evidence of record is that the Respondent only used that order (i) to sell specifically identified lots (none of which were located in the LakePointe Property) for a preapproved release price without necessity of further notice or court order, and, (ii) to continue to employ certain key Bellamah employees in its Albuquerque, New Mexico office. There is no evidence that Respondent ever operated the LakePointe Property. Petition Appendix ("App.") B at 10a, ¶ 6.[2]

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[2] The District Court concluded that "[t]he proffered evidence consists of obligatory operating reports, 11 U.S.C. § 704(8), and shows nothing more than the [Respondent] was

Prior to the commencement of its Chapter 11 case, Bellamah had ceased paying *ad valorem* taxes assessed against the LakePointe Property. Likewise, during the Chapter 11 case, Debtor did not pay any accruing or accrued *ad valorem* taxes assessed against that property. In August 1990, the holder of the second lien against the LakePointe Property moved to lift the Automatic Stay as to the LakePointe Property as well as other real property which collateralized its loan, and Petitioners sought to intervene in that proceeding. The Bankruptcy Court denied Petitioners' motion, expressly providing that Petitioners could, if they chose to do so, file their own Motion to modify the stay. Petitioners never sought to lift the automatic stay,[3] did not seek any adequate protection from the accumulating tax liens until the motion for the Second Abandonment was pending and never sought to compel abandonment. App. A at 7a.

In December 1990, Respondent sought leave to abandon most of the LakePointe Property, and an Order was entered authorizing such abandonment on January 23, 1991. More than two years later, in March of 1993, Petitioners moved to vacate that abandonment. Respondent opposed that motion. In July 1993, Petitioners withdrew that motion and the Bankruptcy Court determined that it had been withdrawn with prejudice.

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attempting to sell the property prior to abandonment." App. B at 10a, ¶ 6.

[3] Shortly after the Bankruptcy Court announced its order in this matter, Petitioners transferred their claim and lien position to a corporation they formed and the corporation obtained a modification of the automatic stay to conduct a trustee's sale under the Deed of Trust.

In November 1991, Respondent filed a Motion to abandon the remaining portion of the LakePointe Property ("the Second Abandonment"). Petitioners objected to the Second Abandonment, alleging that the Respondent was precluded from abandoning the LakePointe Property until the *ad valorem* taxes were paid. The Bankruptcy Court authorized the Second Abandonment. On appeal, the District Court affirmed the Bankruptcy Court's decision. Thereafter, Petitioners appealed the matter to the Tenth Circuit and, after all of the briefing had been completed, Petitioners dismissed the appeal.

Until August 1993, Petitioners took no action to obtain any kind of adequate protection, nor did they request that the property be abandoned. Prior to August 1993, except for objecting to the abandonment of the LakePointe Property and seeking to intervene in a lift stay proceeding, the only affirmative action which Petitioners took which was in any way related to the LakePointe Property was in 1992, when Petitioners filed an action in Texas ("the Texas Action") against the Respondent individually. The suit was predicated on Respondent's allegedly wrongful failure to pay *ad valorem* taxes assessed on the LakePointe Property pre-petition, as well as those taxes accruing during the Chapter 11 and the Chapter 7 proceedings.

Respondent filed this action to enjoin Petitioners from prosecuting the Texas Action, on the grounds that the claims made by Petitioners should not be brought outside Respondent's appointing forum. Respondent also sought a declaration that he had no authority to pay the *ad valorem* taxes which had accrued against the LakePointe Property. The Bankruptcy Court ruled that the

portion of the complaint seeking an injunction was a non-core proceeding. That portion of the case was severed and is still pending at the District Court. The requested declaration was granted and affirmed by the District Court and the Tenth Circuit primarily on the ground that a bankruptcy estate does not owe taxes on abandoned property. App. A at 5a-6a; and, App. B at 10a, ¶ 7. The Tenth Circuit also affirmed because the procedural requisites of 11 U.S.C. § 503 had not been followed so that the Trustee never had authority to pay any of the taxes. App. A at 7a. The Petition seeks review of that declaration.

It is noteworthy that none of the taxing authorities to whom *ad valorem* taxes were owed on the LakePointe Property ever filed any application with the bankruptcy court for payment of the *ad valorem* taxes. Rather, it is the secured creditors whose lien is primed who are complaining about the effect of abandonment of the property.

REASONS THE WRIT SHOULD NOT BE GRANTED

I. THE COURT CANNOT ANSWER THE QUESTIONS PRESENTED IN THIS CASE.

Neither of the questions presented by the Petitioners can be answered in this case. Respondent has never claimed immunity from any obligations imposed by Sections 959 and 960, nor has he claimed that the abandonment expunges any such obligations. Indeed, Petitioners would like nothing better than to see an immunity from or expungement of the *ad valorem* tax obligations as such a ruling would prevent a priming tax lien from attaching to the LakePointe Property.

Although Petitioners pose their Questions to this Court under both Sections 959 and 960, review of the Petition reveals that Petitioners do not make any argument under Section 959. Other than citing Section 959 in the two Questions, Petitioners only mention that statute twice in the remainder of the Petition. First, Petitioners quote from Subsection 959(b) in the mandatory "Statutory Provisions Involved" portion of the Petition. Petition at 2. The only other mention of Section 959 occurs in Petitioners' "Statement" when they observe that the Tenth Circuit stated that Sections 959 and 960 are applicable to an operating trustee. *Id.* at 6. Petitioners articulate no argument why Section 959 presents any question for review or how the Tenth Circuit committed any error with respect to its treatment of that statute. Petitioners' inclusion of Section 959 in the Questions Presented is only nominal.

Respondent has never claimed immunity from any obligations imposed by Section 960. The Tenth Circuit correctly decided that Section 960 does not affect the outcome in this case. Petitioners' entire Petition hinges on the perception that the applicability of Section 960 was decided because the Tenth Circuit stated in a clause that an "operating trustee is subject to Sections 959 and 960." App. A at 4a-5a. Petitioners glean from this comment that the Tenth Circuit ruled that Section 960 is not applicable to liquidating trustees or trustees engaged in liquidating activities. It did not.[4]

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[4] As is explained below, the distinction between operating activities and liquidating activities can be very important in determining the applicability of Section 959(b). *See* discussion at 23-24, *infra*.

Section 960 prevents bankruptcy trustees as officers of federal courts, from claiming immunity from state taxation.

> Section 960 . . . was passed in 1934, at the height of the intergovernmental tax immunity doctrine, in response to a Federal District Court decision holding that a bankruptcy receiver operating a gasoline and oil distributing business was not liable as matter of state law for a state sales tax on motor fuel. Read most naturally, the statute evinces an intention that a State be permitted to tax a bankruptcy estate notwithstanding any intergovernmental immunity objection that might be interposed. . . . and that, as a matter federal law, 'a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise.' *Palmer v. Webster and Atlas Nat'l Bank of Boston*, 312 U.S. 156, 163 (1941).

California State Board of Equalization v. Sierra Summit, Inc. 490 U.S. 844, 852 (1989) (footnotes and some citations omitted). Respondent has never raised any intergovernmental tax immunity objection to paying any *ad valorem* taxes. The Tenth Circuit did not rule that Respondent was immune from taxation in Texas. Accordingly, Section 960 does not affect the outcome of this case.

Petitioners erroneously state that ". . . the Tenth Circuit has apparently chosen to go its own way and hold that Section 960 does not apply to a liquidating Trustee, at least as to the payment of *ad valorem* taxes." Petition at 10. Even a cursory review of the Tenth Circuit's decision reveals that this characterization misapprehends that

decision. The Tenth Circuit recognized the fact that the taxes would have to be paid, and fully embraced Respondent's argument relating to the payment of *ad valorem* taxes, when it stated in its decision:

> As the trustee explains, in bankruptcy proceedings the payment of ad valorem taxes is subject to two basic approaches. If the trustee liquidates the property, the accumulated taxes could be paid as an administrative expense. 11 U.S.C. §§ 503(b)(1)(B) and 507(a)(7)(B). However, because ad valorem taxes are a burden upon, and follow the property, the second approach would be to reduce the liquidating price of the property to reflect the amount of the tax lien and convey the property subject to the taxes. In such a transaction, the purchaser becomes liable for the ad valorem taxes.

App. A at 6a. The Tenth Circuit's pronouncement as to how *ad valorem* taxes are to be dealt with within a bankruptcy context is entirely consistent with this Court's construction of Section 960 and the construction of other courts.

Petitioners's real complaint is that the *ad valorem* taxes assessed the LakePointe Property prime their lien. This is exactly the same result that would have occurred if Bellamah " 'would have been in possession and operating the enterprise.' " *Id.* at 852 (quoting *Palmer v. Webster and Atlas Nat'l Bank of Boston*, 312 U.S. at 163). Prior to bankruptcy and during the pendency of the Chapter 11 proceeding, Bellamah failed to pay *ad valorem* taxes assessed on the LakePointe property. Outside bankruptcy, Petitioners would have been faced with a situation of either losing their lien position in a tax foreclosure suit;

paying the taxes and adding them to the secured, non-recourse debt; or, foreclosing the property subject to the tax liens. Petitioners seek a result from the Chapter 7 proceeding that they could not have achieved outside bankruptcy – having the taxes paid as a priority debt out of the assets of Bellamah. Section 960 was not designed to provide a windfall to secured creditors, but instead to protect the fiscs of state and local governments from intergovernmental tax immunity claims. This is not a case of the taxing authorities seeking payment, but secured creditors complaining that the taxing authorities are being paid in the exact manner that they would have been paid outside of bankruptcy.

This Court approved a similar result in *Boteler v. Ingels*, 308 U.S. 57 (1939). In that case, the Court was faced with California vehicle licensing and registration fee laws which provided that registration fees were due by January 1 on motor vehicles operated within the state during that calendar year and were subject to a penalty if paid more than 30 days late. *Id.* at 58. As is true with Texas *ad valorem* tax laws on real property, California had a statutory lien on automobiles for which the registration fees and applicable penalties were not paid. *Id.*[5] The trustee in *Boteler* utilized the estate's vehicles in California for two months without paying the taxes or penalties. *Id.* He then attempted to sell the vehicles free and clear of liens and pay only the taxes, without the penalties. The Ninth Circuit overturned the district court's ruling that penalties were not due, "ordering alternatively that accrued

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[5] *See*, Texas Property Code § 32.01(a) (Vernon's Supp. 1996).

fees and penalties be paid, or that the vehicles be disposed of subject to the lien of the State for the unpaid taxes and penalties." *Id.* (footnote omitted). This Court examined Section 960 (then codified at 28 U.S.C. § 124a) and affirmed, observing that Section 960 "indicates a congressional purpose to facilitate – not to obstruct – enforcement of state law; the court below correctly recognized and applied this congressional purpose and its judgment is affirmed." *Id.* at 61. Thus, the trustee in *Boteler* either had to pay the taxes and penalties or dispose of the property subject to the California's statutory lien for the unpaid taxes and penalties. Here, Respondent was unable to sell the property and pay the taxes from the proceeds so he "disposed" of the property by abandonment "subject to" the state taxing authorities' liens on the property for accrued tax liability.

II. THE TENTH CIRCUIT CORRECTLY APPLIED THE RELATION BACK DOCTRINE IN THIS CASE.

The Tenth Circuit relied upon the well-understood effect of abandonment, sometimes called the relation back doctrine, in reaching its ruling. App. A at 5a-6a citing *Dewsnup v. Timm*, 908 F.2d 588, 590 (10th Cir. 1990), *aff'd* 502 U.S. 410 (1992). Under the relation back doctrine, title to abandoned property "reverts to the debtor and stands as if no bankruptcy petition had been filed . . . [a]nd is *not* property administered by the estate." *Id.* at 590. The relation back doctrine is not a construct of the Tenth Circuit but is a long-standing rule of bankruptcy law already well-recognized when it was articulated under the Bankruptcy Act by this Court more than fifty years

ago: "Whatever title or inchoate interest may have passed to the [bankruptcy] trustee was extinguished by relation as of the filing of the Petition when the Trustee informed the court [the subject property was] burdensome . . . and was directed by the court to abandon and disclaim [it]." *Brown v. O'Keefe*, 300 U.S. 598, 602 (1937) (citations omitted).[6] *See also* discussion at 16-22, *infra* (discussing the viability of the relation back doctrine).

There is a clearly traceable congressional intent to eliminate a bankruptcy estate's liability for *ad valorem* taxes by permitting abandonment and forcing the collection of those taxes from the taxed property. Congress evidenced its intent to achieve this result when it amended Section 64a(4) of the Bankruptcy Act (the predecessor provision to 11 U.S.C. § 502(b)(3)) in 1926:

> The important expansion of Section 64a(4) . . . was Congress's response to a situation which often saw estates almost entirely depleted by taxes to the detriment of unsecured creditors in

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[6] Although clearly articulated and adopted by this Court under the Bankruptcy Act, the relation back effect of abandonment was first acknowledged by this Court in *Glenny v. Langdon*, 98 U.S. 20, 30-31 (1878). In *Glenny*, this Court stated that relation back "has long been a recognized principle of the bankruptcy law. . . . and there are numerous decisions, English and American, which support the proposition." *Id.* This principle was applied by this Court in at least three other cases prior to the adoption of the Bankruptcy Act of 1898. *Sessions v. Romadka*, 145 U.S. 29, 39 (1892); *Sparhawk v. Yerkes*, 142 U.S. 1, 13 (1891); and, *American File Co. v. Garrett*, 110 U.S. 288, 295 (1884). Accordingly, at the time of the adoption of the Bankruptcy Code in 1978, it had been 100 years since this Court had stated that the relation back effect of abandonment "has long been a recognized principle" of the bankruptcy law.

> spite of the fact that such property was thereafter abandoned to the mortgagee or the taxing authorities. This was so because such taxes were construed, under many state statutes, to be taxes legally due and owing by the bankrupt personally although they might have been liens on the real estate as well.
>
> The injustice of such payments was apparent since the payment of taxes from the bankrupt estate would have the effect of clearing away tax claims which otherwise would have remained charges on real estate in the hands of mortgagees. . . . After the amendment was made in 1926, *the trustee, by the simple process of abandonment of heavily encumbered real estate could reduce the interest of the estate to nothing.*

3 King, *Collier on Bankruptcy* ¶ 502.02 [4] at ns. 29e-29f (15th ed. 1996) (emphasis added). Thus, in bankruptcy, there are two options for treatment of *ad valorem* taxes assessed on property on which the bankruptcy estate is unable to realize equity: (1) a taxing authority can look to the property on which it has a statutory lien; or, (2) payment of the taxes can be made out of the unencumbered assets of the estate. Under either option, the taxing authorities are paid in full. If the taxes are paid out of the estate's unencumbered assets, payment is made out of the pockets of the unsecured creditors, for the sole benefit of the secured creditor.

Example best shows the effect of the two options. Assume that a bankruptcy estate owns a $10 million worth of property encumbered by $1 million in *ad valorem* tax liens and a $12 million mortgage. The trustee seeks to

abandon the property as burdensome. But for abandonment and the no equity position, the *ad valorem* tax claims would be allowable as administrative and/or unsecured priority claims. In this fictitious estate, there is $2 million to distribute to unsecured creditors after payment of all administrative and other priority claims, not including the $1 million in *ad valorem* taxes. Except any deficiency claim by the mortgagee, there are $17 million in unsecured claims.

Under the option in which the estate pays all of the taxes, the mortgagee would have allowable unsecured claims of $2 million,[7] and there would be $1 million left to distribute pro rata to the unsecured creditor pool of $19 million for a dividend of about 5.2%. Under the second option the taxes are paid out of property, the mortgagee would have an allowable unsecured claim of $3 million after crediting the remaining $9 million in value of the property and there would be $2 million to distribute to a $20 million pool of unsecured claim for a 10% dividend. The taxes are paid in full under both options. The only issue is whether the fully unsecured creditors should bear the full brunt of the taxes benefiting only the secured creditor. An additional economic difference between the two options is that the mortgagee may have to pay the tax claims to protect its interests under foreclosure. The issue is one of basic fairness – whether a single secured creditor or the entire pool of unsecured creditors should

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[7] The full $10 million value of the property would be credited against the mortgagee's claims under 11 U.S.C. § 506(a). *Bates v. United States (In re Bates)*, 974 F.2d 1234, 1236 (10th Cir. 1992).

be the beneficiary of the bankruptcy administration. Congress has clearly opted for the second option. The effect of 11 U.S.C. § 502(b)(3) is to eliminate all pre-petition tax claims that might otherwise obtain priority under 11 U.S.C. § 507(a)(8)(B) while abandonment, through the relation back doctrine, eliminates any post-petition claims.[8]

Petitioners suggest that Congress' failure to expressly adopt the relation back doctrine within Section 554 should be interpreted to be a rejection of the concept. Petition at 10-11. However, Petitioners cite no authority for this mode of statutory interpretation and this Court has adopted a completely opposite approach under the Bankruptcy Code. Specifically, this Court presumes Congress to have intended to continue to use practices under the Bankruptcy Act absent either unambiguous statutory language or intent expressed in legislative history to change that practice under the Bankruptcy Code. *See, e.g., Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992) ("*Dewsnup II*") (citing additional authority); *Midlantic Nat'l Bank v. New Jersey Dep't of Envntl. Protection*, 474 U.S. 494, 501 (1986). *See also United States v. Noland*, 64 U.S.L.W. 4328, 4329 (U.S. May 13, 1996) (citing *Midlantic* as authoritative for the proposition that Congress must make its intent specific in the legislative history or the statute to change pre-Code practice).

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[8] Petitioners correctly state that U.S.C. § 502(b)(3) does not apply to post-petition taxes. Petition at 14, n. 12. However, none of the cases cited by Petitioners involve abandonment and none so much as mention Congress's intent that abandonment coupled with 11 U.S.C. § 502(b)(3) should defeat an estate's tax liability for abandoned property.

Indeed, *Midlantic* disposes of Petitioners' construction argument. That case dealt with abandonment under Section 554. This Court recognized that abandonment was a "judicially developed rule." *Id.* Although there is no express exception to the power of abandonment in Section 554, this Court found that three lower court cases decided under the Bankruptcy Act conditioned the right to abandon when issues of public health and welfare were involved, thereby establishing "a corollary" to the power to abandon. *Id.* at 500-01. This Court held that those early cases were not overruled by Section 554 as Congress did not make "specific" its "intent" to do so in the legislative history or statute. *Id.* at 501. The same construction rules must apply to the same statute when considering the much more prevalently recognized relation back doctrine.

As Petitioners observe, there is no language in the Bankruptcy Code that expressly rejects or adopts the relation back doctrine. Petition at 10-11. Likewise, the legislative history does not mention the relation back doctrine which had been clearly articulated and adopted under the Bankruptcy Act by this Court more than forty years before the Bankruptcy Code was adopted and utilized by this Court under the Bankruptcy Act of 1867 since 1878. *See* discussion at n.6, *supra*. Under these circumstances, "this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice." *Dewsnup II*, 502 U.S. at 419. This mode of statutory interpretation is even more compelling since the relation back effect of abandonment has always been a judicial construct and

Congress did not express any intent that the Bankruptcy Code would overrule that authority. *See, e.g.*, H. R. Rep. No. 595, 95th Cong., 1st Sess. 179 (1977) *reprinted in* App. Vol. 2 King, *Collier on Bankruptcy* (15th ed. 1996) (indicating congressional intent to overrule *Caplan v. Maine Midland Grace Trust Co.*, 406 U.S. 416 (1972) concerning a trustee's standing to enforce claims of creditors of a bankrupt corporation against third parties).

Twice this Court has implicitly recognized the continuing vitality of the relation back effect of abandonment under the Bankruptcy Code. First, in *Ohio v. Kovacs* this Court observed that abandonment of contaminated property would shift the clean up costs to "its prior owner, who would have to comply with the state environmental law to the extent of his or its ability." 469 U.S. 274, 284-85 n.12 (1985). Second, in *Midlantic*, the dissent recognized that the ultimate issue was over who paid for the clean up, not over whether it would occur: "The New Jersey Department of Environmental Protection . . . apparently seeks to undo the abandonment and force the trustee to expend the estate's remaining assets cleaning up the site. . . . " 474 U.S. at 516-17 (Rehnquist, J. dissenting). Implicit in both cases is that the effect of abandonment is that the respective estates never owned the properties and therefore could not be held liable for any clean up costs.

Petitioners cite a First Circuit case as critical of the relation back doctrine. Petition at 12-13 citing *United States v. Grant*, 971 F.2d 799 (1st Cir. 1992) (en banc). The *Grant* case was an appeal from a conviction for concealment in a bankruptcy. The defendant/debtor was convicted of fraudulently concealing nine valuable prints

from the trustee. *Id.* at 801-802. On appeal the defendant argued that the prints had been abandoned and, by virtue of the relation back doctrine, the government could not prove that he had concealed "property belonging to the [Chapter 7] estate" within the meaning of 18 U.S.C. § 152. *Id.* at 802-803. The defendant pointed to a settlement agreement between the trustee and the defendant that required the trustee to abandon "all property and furnishings located" in his home. *Id.* 803, n.4. The defendant claimed that the "abandonment revested title in the same entity which held it at the commencement of the case and any interim concealment of the prints was nullified retroactively." *Id.* 803.

The First Circuit's criticism of the relation back doctrine is pure *dicta*. The First Circuit found the assertion that an abandonment of the prints had occurred was "a dubious proposition at best" for two reasons. *Id.* at 803. First, the abandonment occurred only as to property and furnishings in the defendant's home. Only two prints were in the defendant's home before the supposed abandonment. Accordingly, even in the light most favorable to the defendant, seven of the prints which he was convicted of concealing were not abandoned. *Id.* at 803 n.4. Second, the settlement agreement under which the abandonment occurred specifically excluded from its release "claims related to . . . assets wrongfully retained or withheld by the [d]efendant." *Id.* The First Circuit concluded that the abandonment "contemplated by the settlement agreement reasonably can be interpreted to exclude prints still *being concealed* from the trustee at the time of the abandonment" so that the conviction for

continuing concealment for all nine prints was valid. *Id.* (emphasis in original).

Additionally, before suggesting that the relation back doctrine was no longer viable under the Bankruptcy Code, the First Circuit correctly identified it as legal fiction[9] and concluded "its extension to criminal proceedings for bankruptcy fraud arising out of a Chapter 7

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[9] Petitioners seem to think that the term "legal fiction" is a pejorative. Petition at 12-13. One of the cases that Petitioners cite for "criticizing" the relation back doctrine actually applies it as "it fits this case appropriately." *Rosenblum v. Dingfelder,* 111 F.2d 406, 409 (2d Cir. 1940). The second case cited by Petitioner merely stands for the proposition that a debtor cannot use the relation back doctrine to enrich himself at the expense of his creditors, a proposition that is irrelevant to this case. *Wallace v. Lawrence Warehouse Co.*, 338 F.2d 392, 394-95 (9th Cir. 1964). The academic commentator who Petitioners cite for advocating "a comprehensive model" to remedy "the confusion in results of abandonment on tax matters", does suggest a model for the income tax effects of abandonment but does not discuss *ad valorem* taxes. Petition at 12, n.11, citing Jack F. Williams, *Tax Consequences of Abandonment Under the Bankruptcy Code,* 67 Temple L. Rev. 13 (1994). While Professor Williams is critical of continued reliance on the relation-back doctrine he does not believe that a bankruptcy trustee or estate actually ever takes title to abandoned property:

> The [Bankruptcy Code] does not contemplate the displacement of the debtor's interest in his or her property; rather [it] provides for the subordination of the debtor's interest to the trustee's hypothetical judicial lien for the benefit of the estate . . . Abandonment is best viewed as a disclaimer of interest in estate property by a trustee as the representative of the estate. The rights and responsibilities that existed in the property immediately before the bankruptcy filing remain with the debtor throughout the administration of the case,

would disserve the interests of justice that the 'relation back' doctrine was designed to serve." *Id.* at 803-804 (citations omitted). Thus, the criticism of the relation back doctrine was, at best, the fourth reason for affirming the convictions. Just as relation back should not be a defense in criminal proceedings, the First Circuit was improvident in trying to decide whether relation back retains any vitality under the Bankruptcy Code. *See* James L. Shepard, *The Trustee's Bankruptcy Tax Manual* 3-4 (1992) (concluding that *Grant* should be limited to criminal cases).

The First Circuit correctly concluded that some reasons for the relation back doctrine no longer existed under the Bankruptcy Code. *Id.* at 804-805. However, among other things, it completely failed to consider the effect of relation back on *ad valorem* tax liability. The First Circuit did not recognize the congressional intent of coupling the relation back effect of abandonment with a statutory provision (now 11 U.S.C. § 502(b)(3)) that has existed for seventy years to eliminate an estate's liability for *ad valorem* taxes on burdensome property. *See* discussion at 13-14, *supra*. Additionally, the First Circuit did not so much as acknowledge one of the five decisions from

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> subject to the trustee's judicial lien power. In other words, abandonment of the property is a trustee's disclaimer of its judicial lien. . . .

Id. at 34-36, nn. 147 & 159-60. *Cf. Brown v. O'Keefe, supra,* (equating abandonment to a rejection of a gift). If Professor Williams is correct, his view of the effect of abandonment leads to the same result in this case since a person who disclaims a judicial lien in property is not liable for *ad valorem* taxes assessed against the property.

this Court adopting and applying the relation back doctrine. At best, *Grant* stands for the proposition that "blind adherence" to the relation back doctrine is inappropriate. Williams, *supra*, 67 Temple L. Rev. at 37. *Grant* is simply not authoritative or persuasive on the continuing viability of the relation back doctrine under the Bankruptcy Code.

III. THE DECISION BELOW DOES NOT REQUIRE AN ANALYSIS CONTRARY TO THE PLAIN LANGUAGE OF SECTION 721 OF THE BANKRUPTCY CODE.

While their argument is circumspect, Petitioners apparently claim that this Court should grant their Petition because the Tenth Circuit erred in determining that Respondent did not operate the LakePointe Property, even after having received a 721 Order which authorized him to conduct certain limited operations of the Debtor. Petitioners assert that operations pursuant to 11 U.S.C. § 721 are an "all or nothing" proposition, and that the Trustee cannot operate only a portion of the Debtor's business. Petition at 16. Petitioners fail to articulate the reason why they believe the Courts below committed reversible error in determining that Respondent did not operate the LakePointe Property. Based on the Questions presented to the Court, one can only surmise that Petitioners are suggesting that if Respondent operated the business of the Debtor, then he was obligated to pay *ad valorem* taxes on the LakePointe Property out of unencumbered estate assets. However, the issue of whether Respondent was operating the LakePointe Property is

irrelevant for purposes of analyzing the Questions presented by Petitioners, because Respondent has never claimed, nor did the Tenth Circuit find, that Respondent was immune from *ad valorem* taxation.

In the courts below, the issue as to whether Respondent was operating the LakePointe Property was material because Petitioners were urging that Section 959(b) placed limits on a bankruptcy trustee's authority to abandon property which he operated. *See* § 959(b) (requiring trustee's to "manage and operate" property in his possession "according to the . . . laws of the state in which the property is situated . . . "). Respondent vigorously asserted, and the court below agreed, that his actions with respect to the LakePointe Property did not amount to his carrying on business with respect to the LakePointe Property, and accordingly ruled that Section 959(b) was not applicable.

The property and transaction focused analysis by the Tenth Circuit was made in the context of Section 959, not 11 U.S.C. § 721, and is consistent with all reported authority. Contrary to the all-or-nothing approach advocated by Petitioners, courts considering Section 959 issues have used a "property focused" or "transaction focused" analysis. In so doing, they have examined whether the activities undertaken by the Trustee with respect to a particular property constituted operating the business as opposed to liquidation. In *Vass v. Conron Bros. Co.*, 59 F.2d 969 (2d Cir. 1932), a Trustee assumed and performed a debtor's pre-petition lease. In interpreting 28 U.S.C. § 125, an earlier codification of Section 959, Judge Learned Hand stated, "Merely to hold matters in the status quo; to mark time, as it were; to do only what is

necessary to hold the assets intact; such activities are not a continuance of the business." *Id.* at 971. *See also Allard v. Weitzman (In re Delorean Motor Co.)*, 991 F.2d 1236, 1241 (6th Cir. 1993) (suing to avoid a fraudulent conveyance is not "carrying on business" under Section 959(a)); *Rothberg v. Kirshenbaum* (*In re Beck Industries*), 725 F.2d 880, 887 (2d Cir. 1984) (actions taken in furtherance of liquidation, even in a reorganization case, did not subject the Trustee to suit in a non-appointing forum pursuant to Section, 959 (a)). Indeed, Petitioners' argument that there can only be operations, as opposed to liquidation, while a trustee has authority under 11 U.S.C. § 721 is rejected by the terms of the statute itself which requires that any operations be "consistent with the orderly liquidation of the estate."

In the case now before the Court, no evidence was ever presented which indicated that the Trustee did anything with the LakePointe Property except what was necessary to preserve and liquidate that property. The Texas office out of which that property had been operated was closed prior to the Trustee having received his limited authority to operate the business, and none of the individual residential lots which the Trustee sought to sell under the terms of the limited 721 Order were lots located in LakePointe.

In any event, whether the Trustee was operating the LakePointe Property is irrelevant to any determination regarding the LakePointe Property's *ad valorem* taxes. Under Section 960, a bankruptcy trustee is subjected to federal, state, and local taxes to the same extent as the debtor would have been, had he remained in possession. Respondent does not dispute that the taxes have accrued,

nor does he claim that the LakePointe Property is not subject to *ad valorem* taxes. Instead, he asserts that once the property was abandoned, it was as though it were never part of the bankruptcy estate and the estate is not liable for such taxes.

Neither Section 960 nor 11 U.S.C. § 721 sets out how and/or when liabilities to which a trustee in bankruptcy is subject are to be paid. This Court, and the parties hereto, must look to applicable provisions of the Bankruptcy Code for that determination, and for the procedures which must be utilized to obtain such payment. *See* discussion at 27-29, *infra* (procedure required to post-petition claims).

While Petitioners claim that this Court should promulgate a definitive standard by which the actions of a 721 trustee are to be measured, in light of the fact that the Respondent is not claiming immunity for *ad valorem* tax liability, Petitioners have failed to articulate any reason whatsoever why any judicial construction of 11 U.S.C. § 721 would assist in the proper resolution of this case.

IV. THIS IS NOT AN IMPORTANT CASE AND REVIEW BY THIS COURT IS NOT WARRANTED.

Petitioners seek review of an unpublished opinion by the Tenth Circuit. The Tenth Circuit specifically recites that its Order and Judgment in this case "is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel." App. A. at 1a, n.*. Thus, at most, the effect of the ruling below will be to bind those parties and their privies and to create law of

the case for the entire Bellamah bankruptcy. *See Cohen v. Bucci*, 905 F.2d 1111, 1112 (7th Cir. 1990) (the entire bankruptcy case is the "case" law for the case purposes so that a ruling in one adversary proceeding can involve all litigation occurring within a bankruptcy case). Thus the ruling below is of limited precedential value, even in the Tenth Circuit.

Petitioners' argument that this case presents important issues which require resolution by this Court is belied by the dearth of authority on the effect of abandonment on *ad valorem* tax claims. Petitioners do not cite a reported decision reflecting the effect on a bankruptcy estate's liability for taxes because of the application of the relation back doctrine.

Respondent can locate only two reported decisions under the Bankruptcy Code in which the relation back doctrine is used to defeat claims that a bankruptcy estate ought to pay taxes on abandoned property or that a tax liability associated with the abandoned property should be trapped within the bankruptcy estate. *In re Nevin*; 135 B.R. 652 (Bankr. D. Haw. 1991); and *In re Skinner Lumber Co.*, 35 B.R. 31 (Bankr. D.S.C. 1983). Only the *Skinner Lumber* case involved *ad valorem* tax liability. That court held that the relation back doctrine served to defeat any claim for administrative expense priority for *ad valorem* taxes assessed against the abandoned property. 35 B.R. at 32. Like this case, *Skinner Lumber* involved a creditor whose debt was secured by the abandoned property seeking to have the estate pay the taxes on a priority basis rather than having the tax claim disallowed. *Id.* at 31. The

Nevin case involved a debtor's opposition to abandonment of a partnership interest. 135 B.R. at 653. The bankruptcy court observed that the abandonment would shift the tax liability attributable to the partnership interest from the estate to the debtor and ruled that such a shift was appropriate. *Id.* at 654. In *Nevin*, the Internal Revenue Service sought to compel the abandonment and therefore the shifting of the tax liability from the estate to the debtor. *Id.* at 653.

In the light most favorable to the Petitioners, there are two published opinions from bankruptcy courts, and no published decisions from either a district or a circuit court of appeals on this point. The virtual absence of reported decisions, and the fact that those few decisions that exist do not involve complaints of taxing authorities that they are not being paid taxes otherwise lawfully due to them makes the case for issuance of a writ of certiorari extremely uncompelling.

V. EVEN IF PETITIONERS ARE CORRECT CONCERNING THE EFFECT OF ABANDONMENT, THE TENTH CIRCUIT'S RULING MUST BE AFFIRMED.

The Tenth Circuit affirmed on an independent ground upon which the Petitioners do not seek review. The Tenth Circuit ruled that there was no authority to pay the *ad valorem* taxes as there had been "no request for payment by the taxing authorities" under 11 U.S.C. § 503(a). App. A at 7a. Petitioners argue that obligations occurring under Section 960 are "not limited by 11 U.S.C. § 503(a)". Petition at 14, n.12. However, Petitioners ignore

the plain language of 11 U.S.C. § 503 in making any suggestion that the Respondent was authorized to pay post-petition taxes without a "request for payment" under 11 U.S.C. § 503(a) and the obligatory "notice and a hearing" under 11 U.S.C. § 503(b). The "request for payment" and "notice and a hearing" requirements of § 503 apply to "any tax incurred by the estate, except a tax of a kind specified in a section 507(a)(8)."[10] 11 U.S.C. § 503(b)(1)(b)(i). It is contrary to the plain language of the Bankruptcy Code to suggest that *ad valorem* tax claims can be paid without a request for payment and then notice and hearing. Although decided under the Bankruptcy Act, the only reported decison considering whether taxes accruing against a bankruptcy estate under Section 960 are to be paid without observing the procedural requirements of bankruptcy law holds that such taxes are not "entitled to special treatment" and that Section 960 "does not dispense with the necessity for [the taxing authorities] making timely demand for their payment in the receivership proceeding." *McColgan v. Maier Brewing Co.*, 134 F.2d 385, 388 (9th Cir. 1943).

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[10] The taxes described in 11 U.S.C. § 507(a)(8) are either assessed pre-petition or relate to pre-petition transactions. As to *ad valorem* taxes, 11 U.S.C. § 507(a)(8) only applies to "a property tax assessed before commencement of the case unless payable without penalty one year before the date of the tax of the petition". *Id.* at (8)(B). Since Petitioners are only complaining of the effect of the Tenth Circuit's ruling on post-petition taxes, this provision is not applicable. Also, the provisions of § 507(a)(8) are not applicable to Texas property taxes since that subsection is only applicable to "unsecured claims of governmental units" while Texas taxing authorities have a lien on the property for which they assess taxes. *See* n.5, *supra*.

At best, all Petitioners can hope for by obtaining a writ of certiorari is to eliminate the Tenth Circuit's primary holding in this case. Even if successful in that endeavor, Petitioners still lose as there was neither a "request for payment" nor "notice and a hearing", both of which are required under Section 503 before the Trustee would have been authorized to pay the subject taxes. Also, if Petitioners are correct that 11 U.S.C. § 503 is inapplicable to these taxes by virtue of Section 960, they do not raise that issue in the Petition. The Tenth Circuit's ruling on this point does not, by any stretch of the imagination, create immunity from taxation or expungement of a tax obligation so as to fit within the two Questions for which Petitioners seek the review of this Court. Rather the Tenth Circuit's secondary holding is that, regardless of the effect of abandonment, the procedural requirements necessary to authorize the Trustee to pay the taxes were not fulfilled. Petitioners have not asked this Court to review whether a "request for payment" under Section 503(a) or "notice and a hearing" under Section 503(b) are necessary for a trustee to have authority to pay post-petition *ad valorem* taxes.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

Respectfully submitted,

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No. 95-1741

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MOODY H. DAVIS, PATRICIA DAVIS, and
THE BURK B. ROBERTS TRUST,
Petitioners,

v.

STUART D. SHANOR, TRUSTEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

As Respondent's Supplemental Statement has delved into a detailed summary of the prior interplay between Petitioners and Respondent in the Bellamah Bankruptcy case, Petitioners believe several other facts should be considered by this Court for completeness.

Following Respondent's seeking and obtaining authorization to operate the debtor's business pursuant to the provisions of 11 U.S.C. § 721, Respondent sought approval from the bankruptcy court to enter into various contracts for sales of portions of the Lakepointe Property. The aggregate value of the "subordinate Mortgages or Deed of Trust" granted by Bellamah against the Lakepointe Property exceeded $100 million dollars. Nonethe-

less, Respondent sought approval of sales of the Lakepointe Property knowing that no funds resulting from such proposed sales would be available for unsecured creditors. However, the initial contracts for which Respondent sought approval from the bankruptcy court provided for the payment of a commission to the Trustee as well as the payment or assumption of the delinquent ad valorem property taxes which had accrued against the Lakepointe Property.

Finally, Petitioners concur that the bringing of this Petition by a secured creditor rather than a taxing authority is noteworthy. Far too often, secured creditors have been reticent to pursue such matters allowing fee motivated trustees to: (1) allow ad valorem taxes to accrue on property then conveniently absolve all responsibility for such dereliction by means of abandonment or (2) retain overly encumbered property in the bankruptcy estate for years under the guise that if sold, the accruing ad valorem taxes would be paid or assumed by the purchaser. Accordingly, in light of the fact that Petitioners were sued in Texas state court for nearly Two Million Dollars ($2,000,000.00) in ad valorem property taxes, penalties and interest that accrued as a result of the Respondent's conscious refusal to pay such liabilities, this case is, indeed, a "noteworthy" one.[1]

I. RESPONDENT'S BRIEF MISSTATES TEXAS LAW.

The Respondent states that "he 'disposed' of the [Lakepointe] property by abandonment 'subject to' the state taxing authorities' liens on the [Lakepointe] property for accrued tax liability." Respondent's Brief at 12. The Respondent asserts this was in conformance with "Texas

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[1] In all, Petitioners paid in excess of Two Million Dollars ($2,000,000.00) to fully satisfy such delinquent ad valorem taxes, penalties and interest. Of this amount, in excess of One Million Dollars ($1,000,000.00) had accrued prior to Respondent's abandonments of the Lakepointe Property.

ad valorem tax laws on real property." *Id.* at n. 5.[2] The Respondent fails, however, to inform this Court that Texas property tax laws also provide for personal liability for ad valorem taxes and that such personal liability is not relieved by disposition of the property. Tex. Tax Code Ann. § 32.07 (Vernon 1992). Consequently, while the Respondent may believe that the abandonment of the Lakepointe Property was "subject to" the state taxing authorities' liens, Texas law provides that abandonment did not relieve the Respondent of personal liability for the post-petition ad valorem taxes that attached prior to abandonment.

II. RESPONDENT'S BRIEF CONTAINS NUMEROUS MISSTATEMENTS OF FACT.

A. Petitioners' Action Did Not Challenge the Respondent's Authority to Abandon the Lakepointe Property.

The Respondent asserts that "[i]n the courts below . . . Petitioners were urging that Section 959(b) placed limits on the bankruptcy trustee's authority to abandon property which he operated". Respondent's Brief at 23.

This declaration contains a significant misstatement of fact. Petitioners, by the instant case, have not challenged the authority of the Respondent to abandon the Lakepointe Property. The Respondent is apparently confused between this proceeding and a prior proceeding not encompassed within this Petition.[3]

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[2] The Trustee cites to Section 32.01(a) of the Texas Property Code in support of this assertion. There is no Section 32.01(a) to the Texas Property Code.

[3] Petitioners lodged a challenge to the abandonments on a variety of theories including procedural due process grounds in *Davis et al v. Shanor*, Cause No. 92-453 JP/WWD, In the United States District Court for the District of New Mexico. This case was dismissed by the Appellants on August 31, 1993, while on appeal to the United States Court of Appeals for the Tenth Circuit.

B. Respondent Misstates the Issue Regarding Requests for Payment of Taxes.

In his brief, Respondent states that "[t]he Tenth Circuit ruled that there was no authority to pay *ad valorem* taxes as there had been 'no request for payment by the taxing authorities' under 11 U.S.C. 503(a)". Respondent's Brief at 27 *quoting* App. A at 7a. Petitioners believe this statement fails, on several levels, to accurately characterize the issue regarding prior requests for payment of taxes.

First, Respondent has quoted *dicta* from the Tenth Circuit. As such, and by the Tenth Circuit's own directive, this statement was not a factor in the Tenth Circuit's ruling and thus did not constitute an "independent ground" of affirmance. *See* App. A at 7a.

Second, Respondent is aware that advancing this assertion, absent consideration of the proper context, misleads this Court. In fact, as early as 1990, one of the taxing authorities involved in this case [4] filed a proof of claim in the bankruptcy court asserting entitlement to administrative expense treatment for post-petition ad valorem taxes.[5]

Finally, when it became apparent that the Tenth Circuit might have considered this false trail created by Respondent, Petitioners promptly filed a Motion for Leave to Supplement the Record on Appeal to advise the Tenth Circuit that the taxing authorities, in fact, had sought proof of claim relief for collection of post-petition ad

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[4] The taxing authorities involved in this matter were the County of Denton, the City of Lewisville, the Lewisville Independent School District and the Denton County Education District.

[5] Additionally, the Respondent's argument that the failure of Petitioners to comply with the procedural prerequisites of 11 U.S.C. § 503 precludes payment of taxes mandated by Section 960 ignores the directives articulated by this Court in *Boteler v. Ingels*, 308 U.S. 57 (1939) and *Swarts v. Hammer*, 194 U.S. 441 (1904). In those cases, this Court held that a trustee has a duty to pay the taxes that accrue against estate property during the administration of the estate.

valorem taxes. Although the Tenth Circuit denied the Motion, it acknowledged that "the supplement pertains only to a collateral issued discussed by the court in its disposition and would not effect any change in the results of the case."

III. THE APPLICATION OF SECTION 503 DOES NOT PRECLUDE THIS COURT FROM DECIDING THE ISSUES PRESENTED.

In his brief, Respondent stated that the Tenth Circuit held "that the procedural requirements necessary to authorize the Trustee to pay taxes were not fulfilled." Respondent's Brief at 29. This statement is contrary to the plain language of the prior orders of the Tenth Circuit. In denying Petitioners' Motion to Supplement the Record on Appeal, the Tenth Circuit characterized the issue of whether the taxing authorities had previously made claims for post-petition ad valorem taxes as a "collateral issue". Further, as set forth *supra*, the discussion by the Tenth Circuit of the requirements of Section 503 is *dicta* and did not form a basis for its decision below.[6]

Finally, Respondent, as would be expected, argues the "extremely uncompelling" nature of this case for review and the inconsequential effect of a pronouncement by this Court that would vacate the rulings below. However, this case does present issues of pervasive scope and impact as review by this court will address the statutory duties and fiduciary obligations imposed on all trustees in bankruptcy, not just the failures by Respondent in the instance case.[7]

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[6] The Table of Authorities in Respondent's Brief cites 11 U.S.C. § 503 (1993). Respondent's Brief at iii. The portion of Section 503 set forth at length in Respondent's Brief, however, reflects the changes legislated by the Bankruptcy Reform Act of 1994. *See* Respondent's Brief at 2.

[7] Not insignificant is Respondent's *unstated* reasons for the denial of this Petition. Respondent is keenly aware of the magnitude of the consequences of such a ruling. For example, the

CONCLUSION

For the reasons set forth in the Petition and this Reply, the Petition for a Writ of Certiorari should be granted.

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issues raised in the Petition directly impact a pending case styled *Chameleon Holdings Company v. Shanor,* Cause No. 95-960; In the United States District Court for the District of New Mexico (a case where Petitioners' successors-in-interest have made a request for payment of post-petition ad valorem taxes as an administrative expense under Section 503). Respondent is the Appellee in that case and has pled "law of the case" from the Tenth Circuit's decision in the case before this Court as a bar to any liability for the payment of such ad valorem taxes.